

Pavlovich v. Superior Court: Spinning a World Wide Web for California Personal Jurisdiction*

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I. INTRODUCTION

Justice Stevens once described the Internet with its many attributes as a “unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to [it].”¹ A vast array of interconnected computers,²

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1. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997).

2. Due to the nature of the beast, it is difficult, if not impossible, to say with any accuracy just how many people or computers are online. Indeed, “[t]he art of estimating how many are online throughout the world is an inexact one at best.” Nua Internet Surveys, *How Many Online?*, at http://www.nua.ie/surveys/how_many_online/index.html (last visited Apr. 21, 2002). A February 2002 “guesstimate” by Nua put the number at 544.2 million users worldwide. *Id.* In the United States alone, Nua estimates that there are approximately 164.1 million users, almost sixty percent of the population. Nua Internet Surveys, *U.S. & Canada*, at http://www.nua.ie/surveys/how_many_online/n_america.html (last visited Apr. 21, 2002).

the Internet is incapable of precise geographic definition. Indeed, “[t]he Internet has no territorial boundaries. . . . [A]s far as the Internet is concerned, not only is there perhaps ‘no there there,’ the ‘there’ is *everywhere* where there is Internet access.”³ In a world where legal boundaries are often defined by physical ones, courts are increasingly faced with the challenge of applying traditional rules to new and unique technologies. For example, courts have recently been forced to grapple with the following question: when may a court exercise jurisdiction over a nonresident defendant based on his Internet contacts?⁴

In August 2001, a California court addressed this issue for the first time in *Pavlovich v. Superior Court*,⁵ when a Web site operator, Matthew Pavlovich, sought to quash service of process on the basis of lack of jurisdiction.⁶ Despite the apparent lack of *any* contacts with the State of California,⁷ the court held that exercise of personal jurisdiction was supported by minimum contacts.⁸

This Casenote questions the *Pavlovich* court’s holding.⁹ More

3. Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456, 462 (D. Mass. 1997).

4. See, e.g., GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343 (D.C. Cir. 2000); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Bensusan Rest. Corp. v. King, 126 F.3d 25 (2d Cir. 1997); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997); see also Jeremy Gilman, *Personal Jurisdiction and the Internet: Traditional Jurisprudence for a New Medium*, 56 BUS. LAW. 395 (2000) (surveying recent Internet personal jurisdiction cases); James A. Huizanga & John K. VanDeWeert, *Personal Jurisdiction over Internet Defendants*, in PRACTISING LAW INST., CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES NO. 1241: CONSUMER FINANCIAL SERVICES LITIGATION 11 (2001) (surveying cases dealing with the issue of personal jurisdiction and Internet defendants), available at WL 1241 PLI/CORP 11.

5. 109 Cal. Rptr. 2d 909 (Ct. App. 2001), *reh’g granted*, Pavlovich v. Superior Court, 36 P.3d 625 (Cal. 2001). In December 2001 the California Supreme Court granted review of the Sixth District Court of Appeal’s decision. This Casenote suggests that the jurisdictional analysis in *Pavlovich* is flawed and that the supreme court should take this opportunity not only to overrule the lower court’s decision, but also to set forth the appropriate guidelines for Internet jurisdiction under California law.

6. *Id.* at 911.

7. See *infra* notes 38–40 and accompanying text.

8. *Pavlovich*, 109 Cal. Rptr. 2d at 916.

9. This Casenote is meant as a critique of one Internet jurisdiction case, *Pavlovich v. Superior Court*. *Id.* It is not meant to be an extensive commentary on the issue of personal jurisdiction and the Internet. Furthermore, it does not seek to answer the difficult question of when the exercise of jurisdiction over an Internet defendant is reasonable; that subject is beyond the scope of this Casenote. For more on Internet jurisdiction, see generally Joseph S. Burns & Richard A. Bales, *Personal Jurisdiction and the Web*, 53 ME. L. REV. 29 (2001) (examining ways that courts have tried to resolve personal jurisdiction issues based on Internet activity); Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 609 (1998) (positing that personal jurisdiction inquiries related to the Internet should be based on state interests and procedural fairness); Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 438–40 (1998) (suggesting that courts

specifically, it argues that the exercise of personal jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and that the court erred when it failed to quash service of process. Further, this Casenote posits that exercise of jurisdiction here not only eviscerates the mandates of *International Shoe Co. v. Washington*¹⁰ and its progeny, but also extends California jurisdiction to cover Internet users everywhere.

II. PERSONAL JURISDICTION: AN OVERVIEW

Personal jurisdiction is one of the cornerstones of the American legal system, and the initial concern in most cases, for if a court cannot exercise jurisdiction over the defendant, a case cannot go forward.¹¹ Personal jurisdiction concerns a court's ability to exercise power over a nonresident defendant.¹² Absent personal jurisdiction, a nonresident defendant cannot be haled into a foreign court and forced to defend an action.¹³

Personal jurisdiction is a constitutional requirement, flowing from the Due Process Clause of the Fourteenth Amendment to the United States Constitution which forbids "depriv[ing] any person of life, liberty, or property, without due process of law."¹⁴ The Due Process Clause seeks

should focus more on the burden of defending suits in distant forums and on foreseeability of suit in that forum); Adam Cizek, Comment, *Traditional Personal Jurisdiction and the Internet: Does It Work?*, 7 U. BALT. INTELL. PROP. L.J. 109 (1999) (addressing whether questions of jurisdiction and the Internet are amenable to the traditional analysis); Richard Philip Rollo, Casenote, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667 (1999) (discussing the current approaches to personal jurisdiction over Internet defendants).

10. 326 U.S. 310 (1945).

11. This Casenote is not meant to serve as an exhaustive dissertation on the law of personal jurisdiction. Instead, it provides a brief overview as background. For a more thorough treatment of personal jurisdiction, see generally ROBERT C. CASAD, JURISDICTION AND FORUM SELECTION (2d ed. 2001); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE (3d ed. 1999); JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 26 (3d ed. 1997).

12. For purposes of this Casenote, the discussion of personal jurisdiction is limited to nonresident defendants. If the defendant is a resident of a state or domiciled therein, the state may exercise jurisdiction over him. See *Milliken v. Meyer*, 311 U.S. 457, 463–64 (1940).

13. See *infra* note 14 and accompanying text.

14. U.S. CONST. amend. XIV, § 1. Personal jurisdiction has both statutory and constitutional limits. Therefore, every personal jurisdiction inquiry necessarily requires that two questions be answered. First, is the court statutorily authorized to exercise jurisdiction over the nonresident defendant? Second, if there is a state statute, is the

to ensure “that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”¹⁵

Thus, a court may exercise jurisdiction over a nonresident defendant if “he [has] certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹⁶ Due Process is satisfied when two criteria are satisfied—first, the defendant has certain minimum contacts with the forum, and second, the exercise of jurisdiction is reasonable and does not offend traditional notions of fair play and substantial justice.¹⁷

As stated, the threshold question for personal jurisdiction is whether the defendant had contacts with the forum state. The nature and quantity

exercise of personal jurisdiction constitutional according to the facts of the case? Courts may not exercise jurisdiction over a person unless they have been empowered to do so. The legislature of each state must grant its courts power to exercise jurisdiction. Where, as here, a state wants to exercise jurisdiction over an out-of-state defendant, it will generally enact a “long arm statute.” In California, courts are authorized to “exercise jurisdiction on any basis not inconsistent with the Constitution of [California] or of the United States.” CAL. CIV. PROC. CODE § 410.10 (West 2000). Consequently, in California, personal jurisdiction inquiries are, in essence, collapsed into one question: is the court’s exercise of jurisdiction constitutional? See *Sibley v. Superior Court*, 546 P.2d 322, 324 (Cal. 1976) (“This section [410.10] manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations.”).

15. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (stating further that the Due Process Clause “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit”).

16. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). *International Shoe* signaled a significant turning point in personal jurisdiction analysis. Prior to the landmark case, actual physical presence of the defendant in the forum was required. See *Pennoyer v. Neff*, 95 U.S. 714, 733–34 (1877). Physical presence remains a constitutional basis for exercising jurisdiction over a nonresident defendant; thus, if a nonresident defendant is present in the forum state, he may be “tagged” and forced to defend a suit there. See *Burnham v. Superior Court*, 495 U.S. 604, 610–12 (1990).

Ostensibly wishing to base their exercise of personal jurisdiction on physical presence, the *Pavlovich* court stated:

Instant access provided by the Internet is the functional equivalent of personal presence of the person posting the material on the Web at the place from which the posted material is accessed and appropriated. It is as if the poster is instantaneously present in different places at the same time, and simultaneously delivering his material at those different places. In a sense, therefore, the reach of the Internet is also the reach of the extension of the poster’s presence.

Pavlovich v. Superior Court, 109 Cal. Rptr. 2d 909, 916 (Ct. App. 2001), *reh’g granted*, *Pavlovich v. Superior Court*, 36 P.3d 625 (Cal. 2001). One can only guess what the court was getting at. Apparently the court realized the folly of this line of reasoning and quickly abandoned it.

17. The issue may be analyzed in the following two steps: (1) are there minimum contacts, and (2) if so, is the exercise of jurisdiction reasonable? See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–76 (1985); *World-Wide Volkswagen Corp.*, 444 U.S. at 286.

of the contacts will determine whether the court may exercise either general jurisdiction or specific jurisdiction over the nonresident defendant.¹⁸ Where the defendant's contacts with the forum are continuous and systematic, the court may exercise general jurisdiction over the defendant for lawsuits wholly unrelated to the forum contacts.¹⁹ In other words, the defendant may be haled into the forum court to answer for any matter, whether or not it relates to his contacts in the state.²⁰

Where, as in the case at hand,²¹ a defendant's contacts with the forum are not continuous and systematic, then the court may not exercise general jurisdiction over the defendant. In this situation, the court must determine whether the defendant's contacts are of sufficient nature and quality to establish specific jurisdiction, whereby the defendant may be haled into the forum court to answer only for claims arising out of or related to those contacts.²²

Recall that the Due Process Clause requires that the defendant "should reasonably anticipate being haled into court there."²³ For this reason, a defendant may not be forced to defend a suit arising out of random, fortuitous, or attenuated contacts, nor will a defendant be forced to defend a suit arising out of the unilateral activity of another.²⁴ Where, however, the defendant has "purposefully directed" his activities at residents of the forum²⁵ or "purposefully avail[ed himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and

18. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415–16 (1984) (approving of and adopting the distinction between general and specific jurisdiction).

19. See *International Shoe*, 326 U.S. at 318 (discussing the concept of general jurisdiction); see also *Helicopteros Nacionales de Colombia*, 466 U.S. at 414. For more on general jurisdiction, see B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097 (1990); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988). Note that in the case at hand, Pavlovich's contacts with California were anything but continuous and systematic. See *infra* notes 38–40 and accompanying text.

20. Note that if the lawsuit does not arise out of the contacts, the court will exercise general jurisdiction over the defendant; on the other hand, if the lawsuit does arise out of the defendant's contacts, then the court will exercise specific jurisdiction over the defendant. See *infra* notes 22–26 and accompanying text. To the defendant, the distinction is, arguably, irrelevant. Either way, he is forced to defend the suit.

21. See *infra* notes 36–38 and accompanying text.

22. See *Helicopteros Nacionales de Colombia*, 466 U.S. at 414.

23. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

24. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

25. *Id.* at 472 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

protections of its laws,”²⁶ exercise of specific jurisdiction is permissible.

As noted, the threshold question for personal jurisdiction is whether the defendant has minimum contacts with the forum state.²⁷ In addition, the exercise of jurisdiction must comport with “traditional notions of fair play and substantial justice.”²⁸ Thus, where minimum contacts exist, an exercise of personal jurisdiction may still be impermissible if it is unreasonable or unfair.²⁹ Reasonableness is assessed by weighing several factors, including “‘the burden on the defendant,’ ‘the forum State’s interest in adjudicating the dispute,’ ‘the plaintiff’s interest in obtaining convenient and effective relief,’ ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,’ and the ‘shared interest of the several States in furthering fundamental substantive social policies.’”³⁰

In summary, specific personal jurisdiction is permissible if the following three criteria are satisfied: (1) the defendant must have purposefully directed his activities at the forum or purposefully availed himself of the privilege of doing business in the forum, (2) the suit must arise out of or relate to those activities, and (3) the exercise of jurisdiction must be reasonable.

III. THE *PAVLOVICH* DECISION

A. *The Factual Background*

On December 27, 1999, DVD Copy Control Association (DVD CCA) sued Matthew Pavlovich for misappropriation of trade secrets.³¹ While a computer engineering student at Purdue University, Matthew Pavlovich, along with several other defendants, “developed and/or posted computer programs on the Internet.”³² One of the programs posted by Pavlovich was DeCSS—a program designed to decrypt DVD CCA’s Content

26. *Id.* at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

27. *See supra* note 17 and accompanying text.

28. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *see also supra* note 16 and accompanying text.

29. *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) (striking down exercise of jurisdiction as unreasonable, despite being unable to reach a majority on the question of minimum contacts). In California, once minimum contacts have been established, the court will presume that the exercise of jurisdiction is reasonable. *See Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1094 (Cal. 1996). At that point, the defendant bears the burden of proving that jurisdiction is unreasonable. *Id.*

30. *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

31. *Pavlovich v. Superior Court*, 109 Cal. Rptr. 2d 909, 911 (Ct. App. 2001), *reh’g granted*, *Pavlovich v. Superior Court*, 36 P.3d 625 (Cal. 2001).

32. *Id.*

Scramble System (CSS), which prevents DVDs from being copied.³³ DeCSS was developed by reverse engineering CCS algorithms,³⁴ which DVD CCA alleged constituted a misappropriation of its trade secrets.³⁵ The program itself was not written or published by Pavlovich; however, he was aware of the reverse engineering and knew it was unauthorized.³⁶ Despite this knowledge, Pavlovich posted DeCSS to the Internet, thereby disseminating DVD CCA's trade secrets.³⁷

At the time Pavlovich posted DeCSS to the Internet, he was a student at Purdue University in Indiana.³⁸ He did not live or work in California.³⁹ Furthermore, he “never” solicited business in California; designated a registered agent for service of process in California; maintained a place of business in California . . . or even visited California for any business purpose.”⁴⁰ In short, Pavlovich himself had no connection to California.

33. *Id.* The Content Scramble System is used to protect copyrighted material on DVDs. In other words, if a DVD contains a movie, which is copyrighted material, the Content Scramble System prevents the copying of that movie. *See id.* DeCSS was created and originally posted to the Internet by a Norwegian teenager. *See DVD Group Must Show Why Jurisdiction Exists Over Defendant in DeCSS Case*, 2 ANDREWS E-BUS. L. BULL., Feb. 2001, at 1, WL 2 No. 4 ANEBUSLB 1.

34. *Pavlovich*, 109 Cal. Rptr. 2d at 912.

35. *Id.* Note that California law specifically permits reverse engineering. CAL. CIV. CODE § 3426.1(a) (West 1997). However, DVD CCA argued that because use of their software was subject to an agreement not to reverse engineer it, doing so constituted a misappropriation of trade secrets. *See* Evan Hansen, *Hollywood Dealt Setback in DVD Code Case*, CNET NEWS.COM, Dec. 14, 2000, at <http://news.com.com/2100-1023-249956.html?legacy=cnet>.

36. *Pavlovich*, 109 Cal. Rptr. 2d at 912. In a deposition, Pavlovich stated:

They had to reverse engineer those algorithms in order to mimic them. Like just kind of quick once over, when you are reverse engineering something, you see what goes in and what comes out, and if you don't have access to that information, what one would do is try to mimic those, so they wouldn't necessarily be the exact algorithms, but if you can get as close or if you can get the correct results, then the engineering—reverse engineering process can be deemed a success.

Id.

37. *Id.* Pavlovich posted the program on a Web site called “livid.on.openprojects.net.” *Id.* According to the court, Pavlovich owned and operated this site. *Id.* Pavlovich maintained that he did not own it, but did concede that he posted DeCSS on it. Memorandum of Points and Authorities in Support of Petition for Writ of Mandate, *Pavlovich v. Superior Court*, 109 Cal. Rptr. 2d 909 (Ct. App. 2001) (No. CV 786804), available at <http://cryptome.org/dvd-v-521-pqa.htm> [hereinafter Points and Authorities]. Though not addressed in the opinion itself, one may assume that the court found no merit to this contention.

38. *Pavlovich*, 109 Cal. Rptr. 2d at 911.

39. Points and Authorities, *supra* note 37.

40. *Id.*

Pavlovich posted the program on a Web site that he owned and operated, www.livid.on.openprojects.net.⁴¹ The Web site itself was a passive site and “did not involve the interactive exchange of information with users, did not solicit or engage in business activities, and did not solicit contact with California.”⁴² In short, all Pavlovich did was upload a program onto the Internet.

It was this action that formed the basis for DVD CCA’s December 1999 complaint. According to the complaint, Pavlovich misappropriated trade secrets belonging to DVD CCA by republishing DeCSS on his Web site.⁴³ In response to the complaint, Pavlovich moved to quash service of process on the grounds that the California court lacked personal jurisdiction.⁴⁴ Specifically, Pavlovich argued that he did not have sufficient contacts with California to support the exercise of jurisdiction.⁴⁵ The issue wound its way through the California court system⁴⁶ and finally landed in the Sixth District Court of Appeal.

41. *Pavlovich*, 109 Cal. Rptr. 2d at 912. See discussion *supra* note 37.

42. Points and Authorities, *supra* note 37.

43. *Pavlovich*, 109 Cal. Rptr. 2d at 911. Note that this Casenote deals only with the issue of personal jurisdiction. The merits, or lack thereof, of DVD CCA’s complaint are beyond the scope of this Casenote. For more information on the law of trade secrets and the Internet, see generally Victoria A. Cundiff, *Trade Secrets and the Internet: A Practical Perspective*, COMPUTER LAW., Aug. 1997, at 6 (suggesting practical ways to avoid disclosure of trade secrets on the Internet and the legal consequences of disclosure); Ari B. Good, *Trade Secrets and the New Realities of the Internet Age*, 2 MARQ. INTELL. PROP. L. REV. 51 (1998) (addressing trade secret law as it applies to the Internet); Ryan Lambrecht, *Trade Secrets and the Internet: What Remedies Exist for Disclosure in the Information Age?*, 18 REV. LITIG. 317 (1999) (discussing both equitable and legal remedies for disclosure of trade secrets on the Internet); David G. Majdali, Comment, *Trade Secrets Versus the Internet: Can Trade Secret Protection Survive in the Internet Age?*, 22 WHITTIER L. REV. 125 (2000) (examining how courts deal with dissemination of trade secrets on the Internet); Matthew R. Millikin, Note, *www.misappropriation.com: Protecting Trade Secrets After Mass Dissemination on the Internet*, 78 WASH. U. L.Q. 931 (2000) (discussing trade secret protection and the Internet).

44. *Pavlovich*, 109 Cal. Rptr. 2d at 911.

45. *Id.*

46. On June 6, 2000, Pavlovich filed a motion to quash service of process in the Santa Clara County Superior Court; the motion was denied. *Id.* at 909, 911. On September 11, 2000, Pavlovich filed a petition in the Sixth District Court of Appeal for a writ of mandate to compel the trial court to quash service of process due to lack of personal jurisdiction; the petition was denied. *Id.* On October 23, 2000, Pavlovich filed a petition with the California Supreme Court for review. *Id.* at 911. The Supreme Court granted review and transferred the case back to the Sixth District Court of Appeal with directions that the Court of Appeal vacate its denial and direct the superior court to show cause why the relief sought in the petition should not be granted. *Id.*

The high court’s decision order was met with approval and described by some as a “victory for civil liberties on the Net.” Electronic Frontier Found., *Supreme Court Thwarts Hollywood’s War on Cyberspace*, at <http://www.virtualrecordings.com/pavrelease.htm> (Dec. 15, 2000). Pavlovich’s attorney, Allonn Levy, stated that the decision “re-affirmed the principle that you don’t lose your [c]onstitutional due process

B. The Holding

After months of being bounced around the California courts, Matthew Pavlovich's motion to quash found itself before the Sixth District Court of Appeal.⁴⁷ Noting the reach of California's long-arm statute, the court held that, despite "Pavlovich's lack of physical and personal presence in California,"⁴⁸ exercise of jurisdiction was constitutional. The court reasoned that Pavlovich knew that California was the home of the movie industry and a technology "hot spot."⁴⁹ As a result of that knowledge, Pavlovich knew, or should have known, that his activities—republishing a program meant to decrypt DVD CCA's DeCSS—"while benefiting him, were injuriously affecting the motion picture and computer industries in California."⁵⁰ According to the court, this knowledge provided a sufficient showing of "purposeful availment." Furthermore, the court found that exercise of jurisdiction over Pavlovich was not unreasonable.⁵¹

C. Analysis

As stated, the Sixth District Court of Appeal found the exercise of jurisdiction over Pavlovich constitutionally permissible. While the court attempted to provide some rationale for its decision, its analysis is unpersuasive and, arguably, erroneous.

rights when you enter cyberspace." *Id.*

Pursuant to the supreme court's order, the court of appeals vacated its order and directed the superior court to show cause why Pavlovich's motion should not be granted. *Pavlovich*, 109 Cal. Rptr. 2d at 911. The opinion at issue in this Casenote is the result of that order. The superior court's role in formulating the response to that order was likely quite limited. As the real party in interest, DVD CCA filed a return in opposition to the petition. *Id.*

Note that the California rules for appellate review differ substantially from the federal rules. In federal court, a defendant may not seek immediate review of an order denying a motion to dismiss for lack of personal jurisdiction. As a general rule, he must wait until the district court enters a final judgment. This stems from the fact that the federal courts of appeal have "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291 (2000). On the other hand, in California a defendant may seek interlocutory appellate review. See CAL. CIV. PROC. CODE § 418.10(c) (West 2000 & Supp. 2002). For more on California civil procedure, see WALTER W. HEISER ET AL., CALIFORNIA CIVIL PROCEDURE (1996).

47. *Pavlovich*, 109 Cal. Rptr. 2d at 911.

48. *Id.* at 916.

49. *Id.*

50. *Id.*

51. *Id.* at 918.

Noting that the Internet is a new technology, the court stated that “the rules governing the protection of property rights, and how that protection may be enforced under the new technology, need not be.”⁵² According to the court, the United States Supreme Court provided “sufficient guidance”⁵³ in *Calder v. Jones*.⁵⁴

In *Calder*, the Court upheld the exercise of personal jurisdiction despite the defendants’ apparent lack of contact with the forum state.⁵⁵ The case involved allegations of libel premised on an article that was written entirely in another state. Analyzing the personal jurisdiction issue, the Court stated:

In judging minimum contacts, a court properly focuses on ‘the relationship among the defendant, the forum, and the litigation.’ The plaintiff’s lack of ‘contacts’ will not defeat otherwise proper jurisdiction, but they may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the *plaintiff is the focus of the activities of the defendants out of which the suit arises*.

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the ‘effects’ of their Florida conduct in California.⁵⁶

The *Pavlovich* court’s reliance on *Calder* was misplaced. Admittedly, *Calder* involved a factual situation that, at first blush, appears remarkably similar to the case at hand. However, the court overlooked a crucial distinction—in *Calder*, the defendants had contacts with California that were separate and distinct from the harmful effects suffered by the plaintiff.⁵⁷ For example, the reporter who wrote the

52. *Id.* at 912–13.

53. *Id.*

54. 465 U.S. 783 (1984). It is interesting to note that the *Pavlovich* court began its opinion not by offering a traditional analysis of personal jurisdiction, but instead by attempting to analogize to a similar case where jurisdiction was found.

55. *Id.* at 789. The case involved a suit for libel by Shirley Jones against a reporter and editor of the *National Enquirer*. *Id.* at 784–86. Jones alleged that she had been libeled in an article written and edited entirely in Florida. *See id.* at 785–86. The Court stated that despite the defendants’ lack of contacts with California, jurisdiction was “proper in California based on the ‘effects’ of their Florida conduct in California.” *Id.* at 789. The Court went on to hold that jurisdiction was proper “because . . . [defendants’] intentional conduct in Florida [was] calculated to cause injury to respondent in California.” *Id.* at 791. This test has become known as the “*Calder* effects test.”

56. *Id.* at 788–89 (citations omitted) (footnote omitted) (emphasis added). The Court went on to stress the fact that the plaintiff was the focus of the libel. *See id.* at 789–90.

57. *See id.* at 785–86. For example, the reporter who wrote the article frequently traveled to California on business, called sources in California for information on Jones,

article frequently traveled to California on business, called sources in California for information regarding the plaintiff, and phoned the husband of the plaintiff in California to elicit his comments about the article prior to publication.⁵⁸ And as the Court noted, “[t]he article was drawn from California sources.”⁵⁹ One might argue that the wrongful act itself—the libel—was premised entirely on the contacts with those California sources. In light of this, it is understandable that the Court found the exercise of jurisdiction permissible.

In the case at hand, however, Pavlovich’s wrongful conduct was in no way premised on contacts with California. In fact, Pavlovich had no contact whatsoever with California, other than that stemming from the harmful effects of his conduct.⁶⁰

Second, in *Calder*, the Court emphasized the fact that the defendants’ wrongful conduct was specifically “aimed” at the plaintiff herself, a California resident. The Court acknowledged the importance of this factor when it stated that “the plaintiff is the focus of the activities of the defendants out of which the suit arises.”⁶¹ In the case at hand, Pavlovich’s conduct was not aimed at DVD CCA; in fact, he was allegedly unaware of the existence of DVD CCA,⁶² an obscure association formed by the Motion Picture Association of America (MPAA) and two other somewhat obscure groups, the Business Software Alliance and the Electronic Industries Alliance.⁶³

Finally, the harmful effects in *Calder* were actually felt by the California plaintiff in California. In the case at hand, the harmful effects to which the court alludes⁶⁴ were felt not by DVD CCA, but by the motion picture and computer industries—two amorphous and ill-defined groups, as opposed to a specific, identifiable person as in *Calder*—that

and phoned the husband of the plaintiff in California to elicit his comments about the article prior to publication. *Id.* As the Court noted, the article itself was drawn from California sources. *Id.* at 788. One may draw the conclusion that but for the defendants’ telephone conversations with sources in California, the article could not have been written. *See id.* at 785.

58. *Id.* at 785–86.

59. *Id.* at 788.

60. *See supra* notes 38–42 and accompanying text.

61. *Calder*, 465 U.S. at 788.

62. Points and Authorities, *supra* note 37.

63. AOL Legal Dep’t, *Decisions & Litigation: Intellectual Property: DVD Copy Control Association, Inc. v. McLaughlin, et al.*, at <http://legal.web.aol.com/decisions/dlip/DVDCCA.html> (last visited Apr. 22, 2002).

64. *See supra* note 50 and accompanying text.

were not even party to the suit. In short, *Pavlovich* does not involve the same caliber of activities as those present in *Calder*.

Perhaps realizing the inanity of its *Calder* analysis, the *Pavlovich* court seemed to abruptly shift gears in the middle of its opinion and focused on personal jurisdiction analysis. The court began by noting the breadth of the California long-arm statute, and by acknowledging that due process requires minimum contacts and reasonableness.⁶⁵ According to the court, where a court seeks to exercise specific jurisdiction, minimum contacts are satisfied where the defendant purposefully avails himself of forum benefits and where the suit is related to or arises out of the contacts.⁶⁶ Admittedly, it is difficult to find fault with the analytic structure set forth by the court.⁶⁷ What is problematic is the way in which the court used that structure to reach its conclusion.

Perhaps what is most disturbing about the case is the court's willingness to find purposeful availment. Presumably, the court based its finding on the effects test of *Calder*.⁶⁸ Citing a Ninth Circuit Court of Appeals case, *Panavision International, L.P. v. Toeppen*,⁶⁹ the court stated that "the 'purposeful availment' requirement is satisfied where a

65. See *Pavlovich v. Superior Court*, 109 Cal. Rptr. 2d 909, 913 (Ct. App. 2001).

66. *Id.*

67. As previously stated, exercise of specific jurisdiction is permissible where the following three requirements are met: (1) the defendant must have purposefully directed his activities at the forum or purposefully availed himself of the privilege of doing business in the forum, (2) the suit must arise out of or relate to those activities, and (3) the exercise of jurisdiction must be reasonable. See *supra* notes 21–30 and accompanying text. Thus, in the case at hand, California's exercise of jurisdiction is permissible: (1) if Matthew Pavlovich purposefully directed his activities at California, (2) if the cause of action arose out of or is related to his contacts with California, and (3) if exercise of jurisdiction is reasonable.

68. While one might presume that the court is relying on the effects test, it never states that it is doing so and does not cite *Calder*. See *Pavlovich*, 109 Cal. Rptr. 2d at 909.

69. 141 F.3d 1316 (9th Cir. 1998). In *Panavision*, the plaintiff, owner of the trademarks to "Panavision" and "Panaflex," sued Toeppen, a resident of Illinois, for trademark infringement for using the names "Panavision.com" and "Panaflex.com" as Web addresses. See *id.* at 1319. When Panavision protested to Toeppen, he offered to stop using the names if Panavision would pay him \$13,000. *Id.* Panavision refused and brought suit in a federal district court in California. *Id.* Toeppen objected to jurisdiction. The Ninth Circuit Court of Appeals held that jurisdiction was permissible and stated:

Under *Calder*, personal jurisdiction can be based upon, '(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.'

... Toeppen purposefully registered Panavision's trademarks as his domain names on the Internet to force Panavision to pay him money. The brunt of the harm to Panavision was felt in California. Toeppen knew Panavision would likely suffer harm there because ... its principal place of business was in California, and the heart of the theatrical motion picture and television industry is located there.

Id. at 1321 (citations omitted).

defendant's intentional conduct causes harmful effects within the state."⁷⁰ The *Pavlovich* court not only incorrectly construed *Panavision*,⁷¹ but also erroneously applied the *Calder* effects test.

The court myopically focused entirely on Pavlovich's "intentional" conduct, and the harmful effects stemming from it. However, even if one were to concede that Pavlovich's conduct was indeed intentional and that it did indeed cause harm within California, the exercise of jurisdiction is still impermissible. Merely causing an effect within the forum state does not, on its own, satisfy purposeful availment.⁷²

Both *Calder* and *Panavision* recognize that, in addition to causing an effect, the defendant must also have *aimed* his contacts at the forum state.⁷³ The *Pavlovich* court did not address this factor. If the court were to do so, it might have to concede that Pavlovich never expressly aimed his conduct at the forum and that, consequently, there was no purposeful availment. As previously stated, Pavlovich did not aim his conduct at DVD CCA; all he did was upload DeCSS to the Internet. As recognized by the Ninth Circuit in *Panavision*, simply putting something on the Internet is not sufficient to subject a nonresident defendant to suit in the forum.⁷⁴ "There must be 'something more' to demonstrate that the defendant directed his activity toward the forum state."⁷⁵ In the case at hand, the "something more" is simply missing.

Indeed, under the *Pavlovich* court's formulation, California could exercise jurisdiction over anyone, anywhere, who posted something on

70. *Pavlovich*, 109 Cal. Rptr. 2d at 916 (citing *Panavision Int'l, L.P.*, 141 F.3d 1316 at 1321).

71. The court in *Panavision* stated that "under *Calder*, personal jurisdiction can be based upon: '(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.'" *Panavision*, 141 F.3d at 1321 (quoting *Core-Vent Corp. v. Novel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)). The court in *Pavlovich* seemingly ignores *Calder*'s second criteria: that actions be "expressly aimed" at the forum.

72. See *Calder v. Jones*, 465 U.S. 783, 789 (1984) (stating that "the mere fact that [the defendants] can 'foresee' that the article will . . . have an effect in California is not sufficient for an assertion of jurisdiction" and noting that the "intentional, and allegedly tortious, actions [of the defendants] were expressly aimed at California"); *GTE New Media Servs. v. BellSouth Corp.*, 199 F.3d 1343, 1349–50 (D.C. Cir. 2000) (refusing to exercise jurisdiction where defendant did not expressly aim his activities at the forum state); *Panavision*, 141 F.3d at 1321; *Edmunds v. Superior Court*, 29 Cal. Rptr. 2d 281, 287 (Ct. App. 1994) (holding that merely causing an effect "is not necessarily sufficient to afford a constitutional basis for jurisdiction").

73. See *supra* notes 59, 67–69 and accompanying text.

74. See *Panavision*, 141 F.3d at 1322.

75. *Id.* (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997)).

the Internet, provided that they had some vague notion that harmful effects would be caused in California. For example, an Internet user in Timbuktu posting a defamatory remark about a movie actor on a bulletin board might be haled into a California court and required to defend against a defamation of character suit. Surely, this kind of limitless jurisdictional power was not and has never been envisioned by the Supreme Court as valid.

IV. CONCLUSION

As the Internet becomes more pervasive, issues of personal jurisdiction will have to be addressed. As this case illustrates, a defendant using the Internet may have no contact whatsoever with the forum state, other than the impact of his behavior, yet may still be required to defend a suit there. Courts may be tempted to circumvent the requirement of minimum contacts in order to protect the rights of residents. This case presents an opportunity for the California Supreme Court to address this situation and to formulate appropriate guidelines.⁷⁶

TRACEY ANGELOPOULOS

76. On December 12, 2001 the California Supreme Court granted review of the Sixth District Court of Appeal's decision. *Pavlovich v. Superior Court*, 36 P.3d 625 (Cal. 2001).